No. 83-427

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ALEXANDER L. STEVAS,

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW JERSEY,

Respondent,

-*vs*-

JAMES H. HALL, JR.,

Petitioner.

On Petition for Writ of Certiorari
to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITON FOR A WRIT OF CERTIORARI

IRWIN I. KIMMELMAN
Attorney General of New Jersey
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625
(609) 292-8740

Attorney for Respondent

Of Counsel
Allan J. Nodes,
Deputy Attorney General
On the Brief
Debra L. Stone
Deputy Attorney General

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
443-4202

QUESTIONS PRESENTED

1. Whether the Superior Court of New Jersey, Law Division has jurisdiction under *N.J. Const. (1947), Art. 1, par. 7* and *N.J. Const. (1947) Art. VI, sec. III*, pars. 2 and 3 to issue an order compelling a suspect to appear in a line-up.

2. Whether, consistent with the Fourth Amendment of the United States Constitution and *N.J. Const. (1947), Art. 1*, par. 7, a Court may, in limited circumstance on the basis of evidence amounting to reasonable suspicion to believe a suspect has committed an armed robbery, order that a suspect be briefly detained for a nontestimonial identification procedure provided proper procedural safeguards are applied.

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OPINIONS BELOW

The Opinion of the Supreme Court of New Jersey is reported at *93 N.J. 552, 461 A.2d 1155 (1983)*. The opinion of the Superior Court of New Jersey, Appellate Division is reported at *183 N.J.Super. 224, 443 A.2d 767 (App. Div. 1981)*.

JURISDICTION

Peitioner invokes this Court's jurisdiction pursuant to *28 U.S.C. sec. 1257(3)*.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment to the United States Consititution (1791):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution (1791):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution (1868):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 7 of the New Jersey Constitution (1947):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Article VI, Section III, par. 2 (1947):

> The Superior Court shall have original general jurisdiction throughout the State in all cases.

Article VI, Section III, par. 3 (1947), in pertinent part:

> Each division [of the Superior Court] shall ... hear such causes, as may be provided by rules of the Supreme Court.

COUNTER-STATEMENT OF MATTER INVOLVED

This case arises out of the following circumstances: In the early morning hours of February 3, 1978 two men, one white (petitioner) and one black, broke into the home of James Bailey and demanded to know from Bailey and his girlfriend Stacey Dillon the whereabouts of ten pounds of marijuana. (3T107-11 to 108-11; 3T170-15 to 173-15).[1] Bailey and Dillon denied knowledge of the drugs and were subsequently robbed and the home ransacked. Bailey and Dillon, who had been tied up by the robbers, worked themselves free and eventually telephoned the police. The white male robber (petitioner) was described to the police (3T125-14 to 126-6; 3T257-2 to 11), as in his late twenties, approximately six feet in height, weighing about 200 to 230 pounds, with shoulder length, dirty blond hair and a long, full beard. (3T108-12 to 109-8; 3T117-15 to 119-11; 3T175-25; 3T179-12 to 180-2; 3T186-20 to 187-16). Detective Joseph Booket of the Aberdeen Township Police Department telephoned Dillon and Bailey and asked them to come to police headquarters to assist in the preparation of composite sketches of the two bandits. (3T129-1 to 130-1; 3T198-9 to 199-9; 3T263-5 to 12). Ultimately, an unnamed individual identified the man depicted in the composite sketch as petitioner. As a result, an eight year old mug shot of petitioner was obtained and included in a photographic array. Sometime later, Dillon and Bailey were each shown a series of photographs of bearded, potential suspects, which included the old photograph of petitioner. Dillon was unable to identify petitioner. (3T131-6 to 132-18). Bailey, however, made a tentative identification of petitioner's photograph, noting that Bailey could not be absolutely certain because petitioner's hair was "a lot shorter" in the photograph than on the night in question. He, however, asserted that the man depicted in the photograph looked like the white male robber. (3T201-15 to 25; 3T267-2 to 24).

All this information was submitted by the prosecutor in a sworn affidavit executed by Detective Joseph Booket of the Aberdeen Township Police Department, to the Honorable Merritt Lane, Jr., A.J.S.C. in support of a motion to compel petitioner to submit to

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1 T refers to the transcript of the appeal of Pretrial Intervention (PTI) rejection.
2T refers to the transcript of motion to compel petitioner's participation in a lineup.
3T refers to Volumes I and II of the trial transcript.
4T refers to the post-trial proceedings of January 11, 16, 18, 1980.
5T refers to the post-trial proceedings of January 25, 1980.
6T refers to the post-trial proceedings of January 28, 1980.

a line-up. (Da1 to 5).[2] As a result, a hearing was conducted on November 3, 1978, before Judge Lane to determine if petitioner, who was previously arrested in September 1978 on a charge of atrocious assault and battery (PSR5), would be compelled to appear in a lineup. Judge Lane ultimately ruled that Detective Booket's affidavit established an articulable, well-founded suspicion that defendant was involved in the instant offenses. (2T19-24 to 21-3). A lineup was subsequently held and petitioner was identified.

Petitioner James Hall, Jr., was charged in Monmouth County Indictment No. 909-78 with entering without breaking with intent to steal, in violation of *N.J.S.A. 2A:94-1* (Count One); robbery of goods valued in excess of $500, in violation of *N.J.S.A. 2A:141-1* (Count Two); armed robbery in violation of *N.J.S.A. 2A:151-5* (Count Three); assault with an offensive weapon (knife), in violation of *N.J.S.A. 2A:90-3* (Count Four), and possession of a dangerous weapon (knife), in violation of *N.J.S.A. 2A:151-41(c)*. (Da9 to 11).[3]

A jury trial was then conducted before the Honorable Cuddie E. Davidson, Jr., J.S.C., on October 30, 31, November 1, 2, 5, 1979 at the conclusion of which petitioner was acquitted of Count Four - the assault charge - and convicted of the remaining counts.

On November 14, 1979, petitioner moved for a new trial. Consequently, Judge Davidson conducted hearings on the matter on January 11, 16, 18 and 25, 1980. On February 6, 1980, Judge Davidson denied petitioner's motion for a new trial. An order to that effect was filed on February 7, 1980. (Da42).

On January 29, 1980, Judge Davidson sentenced petitioner to a State Prison term of three to four years on Count One (entering without breaking), five to six years for Count Two (robberty) and one to two years for Count Three (the armed feature), all sentences to run concurrently. Count Five (possession of a knife) was merged for sentencing purposes with Count Three.

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2 Petitioner rather disingeniously phrases his summary of the affidavit on page 8 of his petition to imply that the police officer stated that the person who identified the composite sketch was unreliable. This is not what the officer said. (See Da5). In any event, reliablity is not an issue. Here, one person recognized the sketch as depicting petitioner. Moreover, under the totality of the circumstances the reliability of that identification is manifest. *Illinois v. Gates*, ____ U.S. ____, *103 S.Ct. 2317 (1983)*.

3 Da refers to the appendix of petitioner's brief before the Superior Court of New Jersey, Appellate Division.

A Notice of Appeal to the Superior Court of New Jersey, Appellate Division was filed by petitioner on January 30, 1980. (Da48 to 49). On March 1, 1982, the Honorable John W. Fritz, P.J.A.D., the Honorable John L. Ard, J.A.D., and the Honorable Theodore W. Trautwein, J.A.D. affirmed petitioner's conviction. *State v. Hall, 183 N.J. Super. 224, 443 A.2d 767 (App. Div. 1981).* The Court held that a judge of the Superior Court has the power to issue an order compelling a suspect who has not been arrested or indicted to appear in a lineup, based upon a presentation by the prosecutor of facts establishing a well-founded suspicion that the suspect was implicated in the crime being investigated. *183 N.J.Super. at 231, 443 A.2d at 767-768.*

Petitioner filed a petition for certification to the New Jersey Supreme Court, which was granted by that court on May 4, 1982. After additional briefs were filed and argument heard, the Supreme Court of New Jersey unanimously affirmed the ruling of the Appellate Division. *State v. Hall, 93 N.J. 552, 462 A.2d 115 (1983).*

SUMMARY OF ARGUMENT

Point I - The ability of the Superior Court of New Jersey, Law Division to issue process prior to arrest is a question which is resolved solely by resort to provisions of the New Jersey State Constitution.

Point II - Strictly limited pre-arrest detentions of suspects for non-testimonial identification procedures are proper on less than traditional probable cause to arrest, based upon this Court's decisions establishing a variable standard of probable cause.

REASONS FOR DENYING CERTIORARI

POINT I

THE JURISDICTION OF THE SUPERIOR COURT OF NEW JERSEY IS A QUESTION RESOLVED SOLELY ON THE BASIS OF THE NEW JERSEY STATE CONSTITUTION.

The issue of whether the Superior Court of New Jersey, Law Division has jurisdiction to issue process to compel a suspect to submit to nontestimonial identification procedures is purely a question of state consitutitional law. The Appellate Division of the Superior Court of New Jersey found that jurisdiction arose from the inherent power of the Law Division to hear criminal matters. *N.J. Const. (1947), Art. VI, sec. 3* pars. 2 and 3. *State v. Hall, 183 N.J. Super. at 224, 228-229; 443 A.2d at 767-768 (App. Div. 1981).* The New Jersey Supreme Court, acknowledged the utility of those provisions but relied more heavily on *N.J. Const. (1947), Art. 1, sec. 7* and also on the Fourth Amendment of the United States Constitution. 93 N.J. at 552, 557-559, 461 A.2d at 1158, (1983).

Clearly, the question of the jurisdiction of a state trial court is peculiarly a question of state law. In this case jurisdiction arises directly from the provisions of the New Jersey State Constitution despite the New Jersey court's reference to the Fourth Amendment. Art. 1, sec. 7 of the New Jersey Constitution, although worded nearly identically to the Fourth Amendment, has nevertheless been interpreted differently in many instances to provide greater protection for New Jersey citizens. See *e.g., State v. Valencia, 93 N.J. 126, 459 A.2d 1149 (1983)* (telephonic search warrants); *State v. Hunt, 91 N.J. 3381, 450 A.2d 952 (1982)* (availability of telephone toll records); *State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981)* (standing to litigate search and seizure claims). Thus, despite the passing reference to the Fourth Amendment, the decision clearly rests on independent and adequate state grounds. Under these circumstances this Court lacks jurisdiction to consider this issue. *Michigan v. Long, ____ U.S. ____, 103 S.Ct. 3469, 3475-3476 (1983).*

This conclusion is not altered by petitioner's attempt to couch this issue in terms of the court becoming unduly involved with the investigation of criminal cases and thus losing its ability to act as a neutral and detached protector of the constitutional rights of the citizens of New Jersey. (See P16-17). In the case at bar, the court acts to review evidence and determine whether sufficient evidence

citizens of New Jersey. (See P16-17). In the case at bar, the court acts to review evidence and determine whether sufficient evidence exists for process to issue just as it does when it authorizes a search warrant. This is not a situation where the court actively pursues an investigation and then issues process; a situation which this Court decried in *Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979)* and *Coolidge v. New Hampshire, 407 U.S. 443 (1971)*. In *Lo-Ji*, the magistrate actually participated in the search which he authorized. Likewise, in *Coolidge*, the Attorney General actively investigated and prosecuted a case in which he had issued a search warrant as authorized by state law. Clearly, the procedures approved by the *Hall* court do not begin to put a judicial officer in the "dual" positions of the officials in *Lo-Ji* and *Coolidge*. The judge functions purely as a neutral and detached magistrate at all times. Thus, the problems of *Lo-Ji* and *Coolidge* are completely avoided.

In sum, respondent submits that the question of the State court's ability to issue pre-arrest process is solely one of state constitutional law. Thus, the New Jersey Supreme Court properly found such jurisidiction under the state constitution.

POINT II

THE SUPREME COURT OF NEW JERSEY PROPERLY AUTHORIZED STRICTLY LIMITED INVESTIGATIVE DETENTIONS BASED UPON LESS THAN PROBABLE CAUSE.

In *State v. Hall, supra*, the New Jersey Supreme Court in a unanimous decision sanctioned the investigative detention of a suspect for nontestimonial identification purposes based upon less than probable cause. The Court ruled that a lower court has the authority to authorize an investigatory detention provided these four requirements are met:

1. There must be sufficient evidence to demonstrate that a particular crime has occurred, is unsolved and is under investigation.

2. It must be demonstrated that there is a reasonable and well-grounded basis to believe that the individual sought as the subject of an investigatory detention may have committed the crime under investigation.

3. It must be shown that the results of the detention will significantly advance the criminal investigation and will serve to determine whether or not the suspect probably committed the crime.

4. It must appear that the investigative results cannot otherwise be obtained.

See *93 N.J. at 561-562, 461 A.2d at 1160.*

The conduct of the investigatory detention must be carefully circumscribed by additional procedural safeguards according to the Court. The detention and accompanying intrusion must be accomplished in a manner which insures the least amount of harassment of, interference with, or prejudice to the suspect. In most cases notice of the proposed detention must be given to the suspect, and the suspect should be given the opportunity to arrange a convenient time for the detention and to have counsel present. *93 N.J. at 564-565, 461 A.2d at 1161-1162.*

The Supreme Court of New Jersey viewed its ruling as flowing from decisions of this Court which delineate a variable probable cause standard. *93 N.J. at 561-565, 461 A.2d at 1161-1162.* The New Jersey

court balanced law enforcement concerns against the individual's Fourth Amendment rights and enunciated a decision which provides for a reasonable method of effectuating both interests.

It is clear that the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a court to balance the need for the particular search against the invasion of personal rights that each entails. *Bell v. Wolfish, 441 U.S. 520, 559 (1979).* Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it and the place in which it is conducted. See *e.g., United States v. Place, ____ U.S. ____, 103 S.Ct. 2637 (1983); Bell v. Wolfish, supra; United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967).* All of these factors were considered by the New Jersey Supreme Court in arriving at its conclusion that the decisions of this Court provided a basis for finding that a brief detention for nontestimonial identification purposes based upon an evidential finding of less than probable cause to search or arrest a suspect was reasonable.

In so ruling, the New Jersey court was merely following the lead of this Court. Most authorities agree that the real impetus for the concept of detention sanctioned by less than probable cause was Justice Jackson's dissent in *Brinegar v. United States, 338 U.S. 160, 180 (1949).* See, *e.g., La Fave, "'Street Encounters' and the Constitution: Terry, Sibron, Peters, and Beyond," 67 Mich.L.Rev. 40, 57-58, 65 (1968).* In *Brinegar,* Justice Jackson discussed the readiness of the majority to permit the search of Brinegar's vehicle because it was involved in a crime:

> But if we are to make judicial exceptions to the Fourth Amendment for these reasons [*i.e.*, the automobile's ready adaptation to use in a criminal endeavor], it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to maintain such an action executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save

> a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. *[338 U.S. at 182-183].*

This concept of variable probable cause languished, however, until 1967, when this Court decided *Camara v. Municipal Court, 387 U.S. 523 (1967)*, and *See v. Seattle, 387 U.S. 541 (1967)*. Both of these cases concerned the freedom of cities' building code inspectors to examine structures for latent defects. This Court rejected the notion that warrants were unnecessary, but observed that "there can be no ready test for determining reasonableness [of the warrant] other than by balancing the need to search against the invasion which the search entails." *387 U.S. at 536-537.* "'Probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied...." *Id. at 538.* It was at this juncture that this Court established the concept of variable probable cause, noting that such "[administrative] standards [could] vary with the municipal program being enforced...." *Id.*

Moreover, this Court held that varying the test of probable cause from that applied to criminal cases would not weaken the Fourth Amendment:

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant. *** [Such an approach] merely gives full recognition to the competing public and private interest here and, in so doing best fulfills the historic purpose behind the constitutional right to be free from unreasonable government intrusions of privacy. *[387 U.S. at 539].*

It took only one year for this Court to apply its new, variable probable cause concept to criminal law. *Terry v. Ohio, supra*, was the case through which it spoke.

Terry presented a narrow question: "[Is it] always unreasonable for a policeman to seize a person and subject him to a limited search for weapons [if there is no] probable cause for an arrest[?]" *392 U.S. at 15.* Chief Justice Warren's answer for the Court was, "No," and

Terry sanctions a brief detention commonly labeled a "stop and frisk." In reaching this conclusion, the Court emphasized the need "'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *392 U.S. at 20-21*, citing *Camara v. Municipal Court, supra.* (Interpolations are the Court's).

If *Terry* legitimized brief street detentions and superficial searches on less than probable cause, *Davis v. Mississippi, 394 U.S. 721 (1969)*, quite clearly invited longer, off-the-street detentions on less than probable cause. In *Davis*, this Court reversed the rape conviction of Davis whose fingerprints (which plainly linked him to the crime) were obtained when he and 23 other men were caught in a dragnet, although there was no probable cause to suspect any of them.

Justice Brennan, who authored the majority opinion, nevertheless ruled that detentions for fingerprints might, "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." *394 U.S. at 727.* This conclusion was predicated partially upon the relative innocuousness of the intrusion. *Id. at 727-728.*

Dunaway v. New York, 442 U.S. 220 (1979), and *Brown v. Illinois, 422 U.S. 590 (1975)*, are fully consistent with the precedent supporting the use of investigative detention. In *Dunaway*, the defendant was "picked up" on the strength of a third-hand informant's tip in regard to a robberty/homicide which took place several months before. The defendant was brought to police headquarters and interrogated after being given the warnings required by *Miranda v. Arizona, 384 U.S. 436 (1966). 442 U.S. at 203.* This Court emphatically rejected any standard short of "probable cause" for an involuntary custodial interrogation. *442 U.S. at 216.* See Comment, *"Custodial Seizures and the Poison Tree Doctrine: Dunaway v. New York and Its Aftermath," 13 J. Marshall L. Rev. 733, 748 (1980).* The *Dunaway* Court stressed that it was the scope and intensity of the police seizure of the defendant which triggered the probable cause requirement of the Fourth Amendment. *Dunaway v. New York, 442 U.S. at 213-216.* The defendant in *Dunaway* was dragged out of a neighbor's home and incarcerated for eight hours during which period he was subjected to interrogation. The seizure in *Dunaway* possessed all the "trappings" of a traditional arrest.

The limitation of *Dunaway* to "arrest" situations was subsequently highlighted by this Court in *Michigan v. Summers, 452 U.S. 692 (1981)*. In that case, that defendant was detained by the police upon less than probable cause while they searched a house pursuant to a search warrant. This Court found this detention was substantially less intrusive than that of *Dunaway*. In reviewing its holding in *Terry* and its progeny this Court noted that:

> In these cases, as in *Dunaway*, the Court was applying the ultimate standard of reasonableness embodied in the Fourth Amendment.... [T]hey demonstrate that the exception for limited intrusions that may be justified by special law enforcement interests **is not confined to the momentary, on-the-street detention** accompanied by a frisk for weapons involved in *Terry* and *Adams*. [Emphasis added]. *452 U.S. 692, 699-700.*

As noted previously, the touchstone of Fourth Amendment analysis remains "reasonableness"; that is, it depends on a balance between the public interest and the individual's right to personal security. *Bell v. Wolfish, supra; Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)*. It is the application of this "reasonableness" test which apparently has led this Court to hold that law enforcement officers, acting without any prior judicial approval, are constitutionally entitled to restrict the liberty of suspects during a brief period of "investigative detention," upon a reasonable belief, based on articulable facts, that an offense has been committed and that the individual has committed the offense or can provide assistance in solving the crime. See, *e.g., United States v. Place, supra; Michigan v. Summers, supra; Brown v. Texas, 443 U.S. 47 (1979)*.

The *Hall* court has followed these decisions and added the additional protection of prior judicial approval for these police actions. Judicial review and sanction of pre-arrest lineups or other forms of nontestimonial identification procedures provides a number of salutary effects. One of the functions of the judiciary in overseeing the criminal process is to curtail and prevent police overzealousness from impinging upon the constitutional rights of suspects. See generally *Kirby v. Illinois, 406 U.S. 682, 690-691 (1972); United States v. Wade, 388 U.S. 218 (1967)*. The procedures sanctioned by the *Hall* Court permit early review of police actions and, where appropriate, will provide detailed guidelines (see *93 N.J. at 561-565, 461 A.2d at 1161-1162)* for future police actions. This ensures that a judicial

officer will carefully review the grounds for, and limit the extent of, any detention. Furthermore, the value of such evidence is well established. See generally Note, *"Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure,"* *72 Cal.L.Rptr. 712, 732 (1972)*. Obviously, if there is probable cause to believe that a suspect has committed a crime, the police may arrest him and place him in a lineup or subject him to other forms of nontestimonial identification.

In this case, as with other nontestimonial identification procedures, there arises a situation which is less intrusive than that in *Dunaway*. The detention sanctioned here was brief, and based upon considerably more evidence than unsubstantiated hearsay. Defendant Hall was accompanied by counsel and permitted to challenge the order. No interrogation occurred, and most importantly, unlike the situation in *Dunaway*, the procedures in question here were authorized by a neutral and detached magistrate. *State v. Hall, 93 N.J. at 566, 461 A.2d at 1162-1163.*

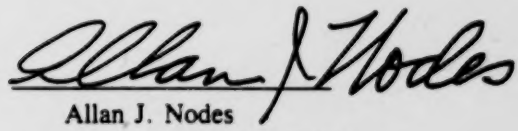
In sum, respondent submits that the decision in *Hall* represents a reasonable application of the standards set forth in the decisions of this Court. Clearly, the public's need to solve crimes justifies the limited intrusion into the rights of a suspect which *Hall* allows. The procedures sanctioned in *Hall* merely represent a reasonable application of principles set forth in the decisions of this Court. There is no question that they fully comport with the requirements of the Fourth Amendment.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
ATTORNEY GENERAL OF NEW JERSEY

By: 

Allan J. Nodes
Deputy Attorney General
Deputy Chief, Appellate Section

ALLAN J. NODES
DEPUTY ATTORNEY GENERAL

OF COUNSEL

DEBRA L. STONE
DEPUTY ATTORNEY GENERAL

ON THE BRIEF

DATED: November 12, 1983